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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 444

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,

Petitioners,

vs.

RKO RADIO PICTURES, INC., A CORPORATION, LOEW'S INCORPORATED, A CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION, PARAMOUNT PICTURES, INC., A CORPORATION, BALABAN & KATZ CORPORATION, A CORPORATION, VITAGRAPH, INC., A CORPORATION, WARNER BROS. PICTURES, INC., A CORPORATION, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION, AND WARNER BROS. THEATRES, INC., A CORPORATION,

Respondents.

REPLY BRIEF FOR PETITIONERS.

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SUBJECT INDEX.

	PAGE
Reply to Respondents' statements of fact	1
(a) The business of distribution	1
(b) The locations of the theatres involved	4
(c) Description and history of the runs and clearances involved	5
(d) Bank night	7
(e) Double features	8
(f) Petitioners' earnings	8
(g) The interest of the public in this lawsuit	9
Argument	11
I. Petitioners' damages were proximately caused by the price-fixing conspiracy	11
II. Double features when played in respondents' prior run theatres were illegal because played under contracts executed pursuant to a price-fixing conspiracy, and the correct measure of damages applicable to this phase of the controversy was the difference in petitioners' profits before and after the illegal double featuring	14
III. Petitioners' theories of damages were not inconsistent, and a finding that the system of release was illegal did not preclude the assessment of damages resulting because petitioners were thereby deprived of an earlier run	18
IV. The damages found by the jury measured the injury to petitioners within the *ad damnum* of the complaint	22

TABLE OF CASES.

Eastman Kodak Co. v. Southern Photo Materials Co.
273 U. S. 359, 378 ..... 21, 2

First National Pictures v. Robison, 72 F. 2d 37 ..... 21, 2

Loewe v. Lawlor, 208 U. S. 274 1

Louisiana Farmers' Protective Union v. Great A. & P.
Tea Co. (CCA 8th), 131 F. 2d 419, 422 1

Monarch Tobacco Works v. American Tobacco Co. (D.
C. Ky.), 165 F. 774 1

Ring v. Spina (CCA 2d), 148 F. 2d 647, 653 2

Story Parchment Co. v. Paterson Parchment Paper Co.
282 U. S. 555, 561-562 2

Swift & Co. v. United States, 196 U. S. 375 1

United States v. Pan-American Petroleum Co. (CCA
9th), 55 F. 2d 753, 766 1

Victor Talking Machine Co. v. Kemeny, 271 F. 810 2

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Reply to Respondents' Statements of Fact.

(a) *The Business of Distribution.*

The general tenor of respondents' brief follows an accustomed pattern of argument to the effect that the motion picture business is so unique that it cannot be subjected to the antitrust laws. The only reason they give for such a claimed exemption is in order that they can procure

"the greatest aggregate rev[illegible] the whole competitive area" (Br. 6c). Obviously, every monopoly and conspira to fix prices has that for its object.

They attempt to justify the system of release because o a shortage of prints (Br. 6b) but the record shows tha the motive for making fewer prints was to keep licens fees at artificial levels (R. 678, 680). It is significant tha supposedly competing producers all make the same limite number of prints because it is "economically" impossib to make a larger number (Br. 6b). In other words, if the made more, each distributor would have to sell outside th artificial restraints of the system of release in order t find a market for the extra prints. This notwithstandin that there are 17,000 theatres renting film, and that th aggregate film rental even in the Chicago District run into fantastic figures (R. 569-570).

Respondents say (Br. 6c) that their system of releas is justified because they are dealing with "old customers" But the Jackson Park theatre is the oldest customer in competitive district and it can buy no films in competitio with respondents' theatres (R. 132-139, 141-143, 146-14 151, 152, 153-155, 160-161, 203, 288-294).

They say (Br. 6c) that size and quality are a reason for classifying theatres in prior runs, but the Mark Brothers, with two of the largest and most luxurious the atres in the Chicago District, could buy no pictures, again the competition of B&K (R. 316, 320-322) and were force to sell their theatres to that company (Br. 6c, R. 326).

They say (Br. 25) that petitioners' theatre cannot b compared with the Warner Jeffery because the latter ha some 350 more seats. They do not point out that thes were balcony seats (R. 818) and that the balcony was kep closed (R. 818) presumably to keep undesirable patrons o of the theatre.

The vice in their entire system of distribution becomes apparent when they admit (Br. 6c): "When the negotiations are with old customers, run and clearance are generally the same as in the previous season's license agreement." This is a masterpiece of understatement. The record shows and respondents admit (Br. 12) not only that B&K's contracts are closed ahead of the field, but that no independent theatre owner can even negotiate for pictures or a playing position until after the B&K clearance contracts are executed (R. 142, 147, 148, 153, 154, 155, 288, 291/2985). The net of this is that no matter what petitioners are willing to pay for pictures or a playing position, they are met by a combination of respondent distributors with a partnership interest in the box office receipts of respondent exhibitors (R. 668, 679, 682, 736, 933, 936-937, 946).

Respondents say (Br. 6d) that unless pictures are licensed in this way distributors cannot derive enough revenue to produce "the kind of feature films to which the public has become accustomed." In view of the facts shown in this record, this is merely saying that unless respondent distributors can be subsidized by a price-fixing conspiracy, they cannot make as much money as they are now making. The theory of the Sherman Act is that competition would bring not only better pictures but lower prices to the public as well.

They say (Br. 6c) that "each distributor attempts to license the successive runs of its films in such theatres, with such clearance and for such license fees as will produce for it the greatest aggregate revenue in the whole competitive area." What they fail to point out is that, as testified by their witness Immerman, a *uniform demand* is made by each distributor on the exhibitors (R. 836-837). They also fail to point out that this uniformity is created by the distributors' clearance contracts with B&K and Warner

which fix the run, clearance and admission prices of some three hundred independent theatres attempting to compete with respondents' theatres (R. 712, 837, Pfs.' Ex. 69; R. 495, 1780-1796).

(b) *The Locations of the Theatres Involved.*

Respondents in arguing that there was no evidence that petitioners in the absence of the conspiracy could have bought an earlier run ignore the issue of location which their own witness Donohue said was controlling (R. 686). The cross-examination of their witnesses disclosed that the Jackson Park theatre was in the geographical center of the entire business district in which the theatres involved are located (R. 759). Other testimony also shows this fact (R. 1139). Their witnesses were so-called experts testifying for a fee (R. 753, 792, 813-814), one of whom had testified in six thousand cases (R. 819). They had artificially divided up the district with string strung on a map (R. 793-794). When one of their witnesses was asked if there was any logical reason why a theatre patron would not step across this artificial boundary to see a prior run picture in the Jackson Park theatre he was mute, confessing inability to answer the question (R. 798). All he could say was that the system by its nature forced petitioners "to eat at the second table" (R. 798).

The Tivoli theatre was located in a "high class" colored district (R. 167) and the whole west side of the street on which it was placed was either torn down or the stores were vacant (R. 167). The other B&K theatres were located in what the witness Malooly called a "typical rooming-house district" with many taverns adjacent to the theatres, which, the witness said, "would be a detracting influence for women and children" (R. 1139). The Maryland theatre was fronted by the Elevated tracks in

this rooming house district (R. 757-758). Petitioners' witness testified that the Jackson Park theatre's location was better than that of any of respondents' theatres (R. 1139, 1141, 1142, 1143) except the Jeffery which was "about on a par with the Jackson Park," (R. 1140). The jury were taken to see all the theatres in the entire district (R. 308) and with this background decided the issue of location against respondents' contentions.

(c) *Description and History of the Runs and Clearances Involved.*

In view of the fact that the system of release was maintained by clearance contracts executed pursuant to a conspiracy its historical background has little relevance. In no event does the record support respondents' assertions about the origin of the system. Prior to the present system of release pictures were played in the Jackson Park district closer to the conclusion of the Loop run than afterwards (R. 312, 244). The system imposes a three weeks' waiting time after the conclusion of the Loop run "to stop the competition of any other theatre with the Loop run" (R. 717-718, 351). Under the old system the clearances were also entirely different, and the Jackson Park played closer to the conclusion of the runs at the Tivoli and the Avalon (R. 169-170, 311-313). It is conceded that the Jackson Park theatre ran into difficulty in the buying of pictures when the circuits of B&K, Lubliner & Trinz and National Theatres were able to take preference in certain instances by virtue of their chain buying power (R. 170, 171, 282, 429, 430). B&K took over Lubliner & Trinz (R. 205) and Warner took over National and carried on the practice (R. 206, 323). The untenable nature of respondents' whole position that the runs and clearances can be based on historical considerations was conceded when re-

spondents' witnesses admitted that no theatre has any vested right to a playing position under the Chicago system of release or under any other method of negotiation (R. 713, 714, 1093).

During the entire eighteen years in which respondents say the runs and clearances existed, Salkin and Mager tried in every season to negotiate a run in C week for the Jackson Park theatre (R. 132-139, 141-143, 146-149, 151-156, 203, 287-294). The distributors would not negotiate with them. The reason was that by virtue of percentage contracts the distributors were in effect partners in the B&K box office receipts (R. 351; Pfs.' Ex. 155; R. 573, 1160, 2052-2058).

It is apparent from the above that since no theatre had any vested interest in a run or clearance (R. 713), respondents could acquire no vested rights in an illegal system of release merely by the passage of eighteen years in all of which they have excluded the successive owners of the Jackson Park theatre from bettering their position (R. 132-139, 141-143, 146-149, 151, 152, 153-156, 160, 161, 203, 287-294).

Respondents' statement (Br. 10), "There is no evidence that after these theatres [*i.e.*, the Maryland and the Jeffery] were built the Jackson Park played ahead of them," is flatly mistaken. See the testimony of Richard Salkin as to the Maryland and the Jeffery (R. 169-170) and the testimony of Leo Salkin as to the old Woodlawn, later named the Maryland (R. 312-313). At the time concerning which he testified Richard Salkin was a salesman in the district for respondent film companies (R. 131).

The RKO-Loew's-Fox Ex. B (R. 2089) to which respondents refer shows that petitioners' Jackson Park theatre in those early days played one-half to two-thirds of its

pictures "clear" of either the Jeffery or the Maryland (R. 2090). "Clear" means not played ahead of the Jackson Park by any of respondents' theatres. The exhibit does not purport to show more than a few months in each year. It was not made from contracts but from newspaper files.

Respondents say that in no instance did they change their theatres' playing positions except to move the Tower theatre from a C to a B run shortly after petitioners bought their theatre (R. 434-435). The Tower was a close competitor of the Jackson Park (R. 166, 214). So far as the other theatres in immediate competition with the Jackson Park were concerned, there was obviously no point in changing their runs because, by virtue of the distributors' conspiracy to sell the "Circuits" first and thus prefer them, they had already obtained runs of pictures ahead of the Jackson Park. To move them up further would only make more competition for respondents' A-run Tivoli and Avalon. The important fact in this connection is that, while admitting petitioners' right to renegotiate their theatre's playing position, respondents prevented them from doing so.

(d) *Bank Night.*

Bank Night drew patrons away from the Jackson Park theatre and into respondents' theatres (R. 173). It is used as a "stalking horse" in this case by respondents to try to explain the loss in petitioners' box office receipts and to obscure the increase in the receipts of respondents' own prior run theatres when compared with a similar four-year average of receipts in the years preceding those involved in this controversy. As compared with its average earnings for 1934, 1935 and 1936, the A-week Avalon, owned by Warner, increased its earnings $465,235.70 during the years embraced in this suit. This confirms pe-

titioners' proof that the system was designed to draw public patronage from the subsequent runs to the higher admission price theatres and succeeded in doing so. Bank Night receipts of the Jackson Park theatre were eliminated in petitioners' computation of their loss of profits (R. 470-473).

(e) *Double Features.*

While an attempt is made (Br. 18) to show that Warner was not consulted by B&K about double features and did not know that B&K was going to adopt that policy until Coston learned that B&K had introduced double featuring, the fact is that Coston had the extra pictures necessary for double featuring in the Warner theatres under contract for the 1936 and 1937 season (R. 1089). These contracts were negotiated in August, 1936 (R. 336, 377, 391), almost six months ahead of the time that B&K instituted double features (R. 283, Pfs'. Ex. 45; R. 432, 1595).

As respondents admit (Br. 19), all the pictures obtainable were played ahead of the Jackson Park under double features. No "clear" pictures were available (R. 174, 144-145). As shown in our original brief (pp. 17-19), this greatly increased the damage done to petitioners' theatre by the illegal system of release.

(f) *Petitioners' Earnings.*

Respondents say (Br. 17) that from November 1, 1936 to the time of the trial each of the four partners drew about $57,000 from their joint investment. They do not point out that the partnership business included not only the theatre but rentals from a whole block of stores and offices and property adjacent to the theatre (R. 604). The theatre itself paid no rent (R. 478). *It is apparent that if*

proper rental charge had been made, the theatre would not have shown any profit whatever to petitioners.

Respondents' statement that their own theatres in subsequent runs, as shown by graphs, likewise lost money, confirms petitioners' proof that the system of release was depressing the subsequent runs to benefit the prior runs.

At pages 7 and 17 of their brief respondents make a strange argument, symbolic of their whole position. They seem to say that, because petitioners bought their theatre from their parents for a price of $390,000, this in some manner places a ceiling over any damage occasioned the going business so purchased because of respondents' wrongful acts. This argument, followed to its logical conclusion, means that any business the original purchase price of which has been amortized by earnings can recover no damages by virtue of a violation of the antitrust laws no matter how vicious in fact that damage may be in depriving the going business of its patronage. This is indeed a new qualification upon Section 7 of the Sherman Act.

(g) *The Interest of the Public in This Lawsuit.*

Respondents try to justify their system on the ground that it benefits the public. Aside from the manifest injury to the public implicit in the price fixing shown by the evidence to exist as the keystone of the arch of the system of release, the record as a whole shows that respondents have erected a completely integrated monopoly and have "cartelized" the entire industry in such manner that the independent theatre owners live only by sufferance, unable even to bid against respondent exhibitors for the pictures upon which they depend for their very existence. The physical facts, which cannot commit perjury, which cannot be tortured or warped from their true context, and

which are unbiased witnesses to the truth, prove a system of distribution alien to a competitive system and prohibited by the Sherman Act. The record shows that the system is used by respondents to fix prices to the injury of the public and to destroy competition. Its effect is to regiment men by arbitrarily assigning them to a given niche or position and making it impossible for them to improve or better their lot or to sell their film exhibition to the public at competitive prices.

ARGUMENT.

We confine this reply to respondents' argument on issues not met by our original brief.

I.

Petitioners' Damages Were Proximately Caused by the Price-Fixing Conspiracy.

Both at the trial and here respondents have attempted to dissect the price-fixing elements away from the system of release. They use in this connection a spurious argument to the effect that no proof of price fixing can be considered in determining whether or not the system of release is illegal, unless petitioners show they were damaged solely because they could not reduce their own admission prices. Respondents say (Br. 14), "No injury was done the plaintiffs by the minimum admission price requirements," but they argued no objection to the legal sufficiency of the following instruction which negatives their contention (R. 1191-1192):

> "The Court instructs the jury that if they find that the defendants, or some of them, have entered into a combination to fix admission prices and that as an integral part thereof runs and clearances are set up for the exhibiting of motion pictures under a so-called system of release and that as a result thereof the plaintiffs are unable to obtain motion pictures for exhibition in their theatre until after such pictures have been shown by the competitive theatres owned by Warner Bros. Theatres, Inc., or by Balaban & Katz Corporation and that as a proximate result thereof the plaintiffs are damaged, then your verdict shall be for the plaintiffs *even though the plaintiffs did not attempt to exhibit motion pictures at prices less than the minimum admission prices fixed.*"

Respondents thus, after abandoning all arguments on the instructions, seek to ignore the well-established rule therein stated that all acts done in the course of and pursuant to a price-fixing conspiracy become illegal.

In *Monarch Tobacco Works* v. *American Tobacco Co.* (D. C.-Ky.), 165 F. 774, as here, it was argued that, since the particular act which immediately impinged upon plaintiffs' business might be legal standing alone, the plaintiffs' damages were not caused by the illegal purpose of the combination. The decision of the court, although at *nisi prius*, is convincing when it disposes of this contention in the following language (pp. 779-780):

> "The effect of this proposition, if sound, would be that the illegal conspiracies and combinations which were entered into by the defendants gave the plaintiff no cause of action, because, though they were in fact carried into effect, it was done by a series of separate acts, each one of which, when taken alone, was within the rights of the defendant. That this, while plausible, is not sound, would seem to be indicated with sufficient clearness by what the Supreme Court said in *Swift & Co.* v. *United States* (196 U. S. 375, 396). * * *
>
> "The reasons for the rule do not seem to lie very deep, it being conceivable that the object of every such combination could, and probably would, be consummated by acts which would be perfectly lawful if not done with the design to put the unlawful scheme into successful operation. The conspiracy and combination, though themselves unlawful, cannot injure any person either in his business or property so as to give him a cause of action under section 7, unless something be done to make the combination and conspiracy effective; but whatever is done by those engaged in the scheme or plot *with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme*, however innocent it might otherwise have been, the separate acts becoming thereby so interwoven with the unlawful scheme as to cause

the injury 'by reason' of the combination, within the language of section 7." (Italics supplied.)

We have shown in our original brief (pp. 9-10) that price fixing was an integral part of the system of release and motivated the creation of runs and clearances whereby pictures were withheld from the Jackson Park theatre until the tenth week after the conclusion of the Loop run. Under Point II of that brief we show how the system of release damaged petitioners and the extent of that injury.

In *Louisiana Farmers' Protective Union v. Great A. & P. Tea Co.* (C. C. A. 8th), 131 F. 2d 419, the court said (p. 422):

> "Acts in themselves lawful considered alone, if a part of a plan for controlling prices to eliminate competition in interstate commerce, are unlawful."

This Court has held that all acts done in the course of and pursuant to a Sherman Act conspiracy are tainted with the illegality of the condemned purpose, *Swift & Co. v. United States*, 196 U. S. 375, *Looper v. Lanier*, 208 U. S. 274.

The effect of the price-fixing conspiracy was to make illegal respondents' contracts and clearance agreements which set up the release system. It was the contracts and the system of release created thereby which kept pictures away from petitioners and prevented them from buying earlier pictures and assigned them to a "tenth week" run. It was admitted in respondents' answers that, except for the B&K and Warner clearance contracts, they would not have refused to sell pictures to petitioners prior to the tenth week after the conclusion of the Loop run (R. 34, 43-44, 53, 62). The injury and consequent damage to petitioners are thus admitted.

II.

Double Features When Played in Respondents' Prior Run Theatres Were Illegal Because Played Under Contracts Executed Pursuant to a Price-Fixing Conspiracy, and the Correct Measure of Damages Applicable to This Phase of the Controversy Was the Difference in Petitioners' Profits Before and After the Illegal Double Featuring

After conceding at page 2 of their brief that

> "The verdict and judgment in the District Court of a conspiracy and the approval of this in the Circuit Court of Appeals has put at rest for this case the defendants' contentions to the contrary. * * *"

respondents proceed to argue at pages 17 to 21 that there was no proof of a conspiracy to damage petitioners by double features or by extending the illegal system to cover all pictures instead of only part of them.

On this point the court of appeals held—

> "Appellants contend that there was no evidence which supports the general finding of the jury that double features were introduced by them as a part of their conspiracy, as alleged. * * * It is sufficient to say that neither the sale nor use of double features is illegal *per se*, but if the sale or use is a part of an illegal conspiracy, such as here alleged, every element used for the purpose of accomplishing the intended result of such illegal conspiracy becomes tainted with illegality. * * * The general verdict of the jury, in effect, finds this evidence to be true, and we cannot disturb it." (R. 2274.)

In spite of the fact that they do not contest the above ruling, respondents attempt (Br. 24-26) to contend that in order to show damages from double features it is necessary to show that there was a separate conspiracy between respondents to institute a double feature policy in their prior run theatres. Since, as the court of appeals has held, the system of release created by respondents' clearance

contracts is the result of a conspiracy between respondents, all playing of pictures by respondents under their clearance contracts is affected with that illegality. (See the trial court's charge to the jury (R. 1265, 1271, 1275, 1276).) Respondents in effect admit (Br. 19-20) that their system was much more damaging to petitioners when all available pictures were used under it in respondents' pre-release theatres. Prior to the institution of double featuring the Jackson Park theatre was always able to buy some pictures that had not already been shown. Some pictures were thus always available free of the restrictions of the illegal system (R. 144, 174). They could be purchased in a free market. When those pictures were taken away by respondents' prior contracts, made pursuant to a conspiracy, and placed under the restriction of the illegal system, petitioners were obviously damaged.

Respondents say (Br. 20), "There was nothing to indicate that one clear picture would increase the box office receipts over two pictures on a single program." Richard Salkin, testifying as to the effect of this on petitioners' business, said (R. 174), "The admissions dropped and continued to drop."

The respondents' argument on this issue seeks to obscure the underlying fact of their own conspiracy to establish the system of release. If the system was illegal for single features its illegality was only aggravated by double features. Certainly *they could not make the system legal by the simple expedient of using twice as many pictures in their pre-release houses to the greater damage of petitioners.*

That Warner adopted double features a short time after B&K certainly does not negative Warner's participation in the institution of double features or in the system of release, because the record shows that Warner pur

chased the pictures necessary to institute double features under its contracts for the 1936-1937 season at the same time as did B&K (R. 1089).

As stated in *United States* v. *Pan-American Petroleum Co.*, (CCA 9th) 55 F. 2d 753, at page 766:

> "We know of no rule of law which requires the details of a conspiracy to be completely worked out in advance, in order to bring given acts within the scope of the general plan."

By their double featuring respondents were taking pictures out of an open market and playing them in their pre-release houses under the illegal system (R. 854-858). Whatever they played was licensed under the illegal system of release. It was the system under which the pictures were licensed that caused petitioners' damage, and the jury found that the system was established by respondents' conspiracy and this finding was affirmed by the circuit court of appeals (R. 2270).

While respondents assert that some of the period used for comparison embraced double features (Br. 19) the record shows that the *average* used was that of the four years 1933-1936 (R. 446). Double features were not started by Warner until August, 1937 (R. 1087). They were not started by petitioners until February, 1937 (R. 217). They were started on December 25, 1936 in the Maryland Theatre (R. 1595). The remaining six days of 1936 do not impair the accuracy of the computation because they decrease the amount of earnings used as a basis for comparison. Further, the proof exceeds by over $5,000 the amount of the verdict. *Bank night earnings were eliminated* (R. 470-473).

The proof of damage was thus a comparison between a time when petitioners could obtain some pictures free of the restrictions of the illegal system and the subsequent time when they could not. This comparison was the following (Pfs.' Ex. 48; R. 466, 1713):

JACKSON PARK THEATRE

	7/28/37 12/31/37	1938	1939	1940	1941	1/1/42 7/27/42	Grand Total
Playing under Double Featuring:							
Net profit per income tax returns	$ 13,215.32	$ 23,812.96	$ 20,140.60	$ 13,524.36	$ 13,150.05	$ 10,496.72	$ 94,340.01
Playing under Single Featuring							
Average net profit for four year period 1933-1936, eliminating estimated "Bank Night" receipts	18,927.00	44,080.00	44,080.00	44,080.00	44,080.00	25,073.00	220,400.00
Difference between four year average net profits under single features and actual net profit for subsequent years under double features	5,711.68	20,187.04	23,859.40	30,475.64	30,849.95	14,576.28	125,059.99

Pfs' Ex 48 R 406 1713

Since respondents' double featuring was illegal the above comparison of profits in petitioners' theatre was obviously the proper measure of damages to be applied to this phase of the conspiracy. It conclusively supports petitioners' verdict. It is the only possible way that damages resulting from an illegal extension of respondents' system could ever be proved.

III.

Petitioners' Theories of Damages Were Not Inconsistent and a Finding That the System of Release Was Illegal Did Not Preclude the Assessment of Damages Resulting Because Petitioners Were Thereby Deprived of an Earlier Run.

Respondents argue (Br. 23-25) that damages could not be predicated on their refusal to license pictures to petitioners earlier than ten weeks after the conclusion of the Loop run, saying that those damages could only be determined under the theory that the system of release was lawful, which theory was inconsistent with a finding that the entire system was unlawful. Contrary to respondents' assertions, the only question presented is whether this damage was caused by an illegal price-fixing conspiracy.

A general price-fixing conspiracy was embodied in respondents' clearance contracts, and there is no inconsistency in asserting damages resulting from those contracts which deprived petitioners of the right to buy earlier pictures.

It is true that the jury were instructed that, even if they found no price-fixing conspiracy to exist, they still could find a conspiracy limited to preventing petitioners from obtaining a C run. But once a price-fixing conspiracy was proven this instruction became surplusage. The fact that

under the instructions the jury could have found respondents not guilty of a price fixing conspiracy and could still have found them guilty of conspiracy to prevent petitioners from acquiring a run does not militate against their finding that the illegal clearance contracts accomplished the same result. Respondents admit in their brief (p. 5) that the conspiracy found by the jury had for its object the prevention of "plaintiffs from competing freely with the defendant exhibitors for a run of their own choice * * *". This admission destroys their contention that the resulting damage could not be assessed by the jury.

This point is fully covered at pp. 48-56 of our original brief.

Since petitioners admittedly had a right to negotiate with individual distributors for an earlier run (R. 1220), the jury clearly were entitled to find the damages resulting to them from illegal clearance contracts which prevented such negotiation.

Respondents say (Br. 124), "The evidence does not permit a finding, and none has been made, that the plaintiffs would have prevailed in the bidding." In making that statement they close their eyes to the proof set forth at pp. 14-17 of our original brief, and to the fact that the jury by their general verdict found the issue against them. What respondents really argue is that this Court must hold as a matter of law that a jury could not pass on this issue; that, respondents by conspiracy having determined the runs to their own satisfaction, courts and juries are foreclosed from further inquiry.

As shown in our original brief, there was ample evidence from which the jury could, and by its general verdict did, conclude that petitioners were discriminated against in the refusal to sell them an earlier run. A refusal to negotiate was continued by all the distributors for eighteen years,

during six of which the theatre was owned by petitioners. The jury heard the testimony of Salkin and of Mager, a completely disinterested witness (R. 288), and held against respondents on the issue.

But, say respondents (Br. 24-26), because the net difference in admissions in the Maryland theatre in C run exceeded the Jackson Park's admissions in the first-week run by only $115,982.34, and Richard Salkin estimated that the Jackson Park would in a C run have equalled these admissions, the damages found by the jury show that this branch of the case could not support the verdict. We have shown in our original brief (pp. 49-51) that the jury were permitted to find the damages caused by "one or more" of the objects of an illegal price-fixing conspiracy, and that petitioners' *ad damnum* precluded a larger verdict than $120,000. Therefore the most than can be said for respondents' argument is that by its size the verdict showed that the jury found the entire system illegal. This, however, did not preclude an assessment of damages caused by respondents' clearance contracts which were illegal. Richard Salkin's estimate was based on the assumption that the Maryland remained in C run (R. 253). The jury had the right to conclude that under competitive conditions the Jackson Park would have displaced the Maryland in the run. In which event, Salkin testified, its increased earnings would have been sufficient to support the entire verdict (R. 260) *regardless of whether fixed admission prices had been imposed* (R. 257, 258). The computations set forth at page 16 of our original brief show this conclusively. There was no evidence to the contrary. It is clear from our original brief (pp. 52-56) that the verdict cannot be construed or dissected, and therefore that it is a finding in favor of the prevailing parties of all the damages proved "under such theory or theories upon which they relied" (R. 2271).

Respondents cite and rely on *First National Pictures* v. *Robison*, 72 F. 2d 37 (Br. 44) as an authority for the proposition that loss of profits caused by exclusion from the benefits of an illegal system cannot be recovered (Br. 44-45). That case is not in point because there the plaintiffs were relying on the ruling of an illegal zoning committee to establish their run. They were in effect complaining because they were no longer parties to a conspiracy which had previously given them the run. The theory advanced in the instant case is that petitioners' damages result from their exclusion from the right to bid for and buy a prior run without being faced by illegal clearance contracts which exclude them from such a run and prefer respondents' theatres. Respondents concede by their own instructions (R. 1220) petitioners' right to buy a prior run so long as they do not conspire with respondent distributors in doing so.

For the same reason the decision in *Victor Talking Machine Co.* v. *Kemeny*, 271 F. 810 (Br. 44) is not in point. In the latter case the plaintiff was a joint participant in a price-fixing scheme from which he was realizing more profit than he would in a competitive market. That case is expressly distinguished in the *Eastman Kodak case*, 273 U. S. 359, at page 378. The other cases cited by respondents (Br. 40-41) are distinguishable on the same ground or on their individual facts.

Certain remarks of petitioners' counsel made in the argument before the jury are claimed to be inconsistent with the above. These remarks are isolated from the balance of the argument which is not contained in the printed record, but in any event they could not affect the verdict because the court instructed the jury to disregard any statement made by counsel which was contrary to the law as given in the court's instructions (R. 1263). That petitioners' position

here is completely consistent with their position at the trial is shown by colloquy with the court (R. 228, 232, 233). The jury had not only the right but the duty to view the issues as permitted by the court's instructions. Their general verdict precluded further inquiry.

We submit that the only limitation on the jury's finding of damages was the *ad damnum* and the evidence in the record. Their verdict was consistent with that evidence and with the applicable law set forth in the instructions.

IV.

The Damages Found By the Jury Measured the Injury to Petitioners Within the Ad Damnum of the Complaint.

At page 28 of their brief, respondents concede the accuracy of petitioners' computation of $125,659.99 as the difference "between the adjusted average annual net profits of the plaintiffs' predecessors in the four years 1933, 1934, 1935 and 1936 as submitted by the plaintiffs' accountant, and the average net profits for the five years beginning July 28, 1942." They also concede that this amount was "cut down to $120,000.00 because that was the amount alleged in the complaint", thus destroying any logical basis for a construction of the verdict on the basis of its amount. They further concede "The chief vice of this method is not in the lack of approximation in the calculation".

There is thus presented a situation where respondents do not contest the finding of the jury and the ruling of the circuit court of appeals that the extension of the illegal system by double featuring was an illegal act done pursuant to a conspiracy; where they admit that there exists in the evidence a comparison of profits before and after the illegal act which in amount more than supports the verdict; and

where the circuit court of appeals has found petitioners injured by this illegal act but has overlooked the comparison above referred to in showing the amount of such damage.

The only answer respondents even attempt is to assert their own wrongdoing as a defense to petitioners' proof of damages. They say that, because they illegally imposed minimum prices upon all theatres licensed in the Chicago District, therefore petitioners' computations cannot be used because the profits they represent were made with the help of "the price upkeeping plan" which respondents had illegally introduced and maintained.

Respondents have given a different twist to the issue of estoppel which they lost below. They now claim that petitioners are beneficiaries of the illegal system of release and therefore can recover no damages.

In this case petitioners complained of a conspiracy from which only respondents could derive any benefit. The jury have found such a conspiracy to exist and respondents take no issue with that verdict.

In arguing the contrary, respondents ask this Court to assume what the jury's verdict expressly negatives; namely, that the price-fixing conspiracy was of advantage to petitioners. Petitioners had nothing to do with the price fixing (R. 962). They were not consulted about it (R. 142, 430). Respondents' own witnesses testified that the price-fixing scheme was designed primarily to benefit the Loop run theatres (R. 936-937, 717, 718). Petitioners had no stake in the box-office receipts of the prior run theatres which the system was designed primarily to benefit, and these theatres were petitioners' competitors (R. 905). Petitioners had no voice or opportunity to change anything (R. 172, 244). They either signed the contracts tendered or they obtained no pictures (R. 203, 649). That a formal protest would have

availed them nothing is admitted (R. 960). If they departed from the minimum admission price schedule they lost their license and were out of business (R. 264). Petitioners were victims, not beneficiaries, of the system, and the jury so held. Petitioners could not compete for pictures and could not compete for patronage with lower admission prices.

The circuit court of appeals held the *Eastman Kodak* case to be controlling on the issue of estoppel (R. 2273) and we submit that it is also controlling on the issue of damages.

In the instant case petitioners' complaint is against a conspiracy which creates and maintains an illegal system of distribution which injures petitioners' business. They base their rights on the Sherman Act, which assures them the right to buy the pictures necessary for their business in a market where distributors compete for their business and do not combine in a conspiracy to deprive them of a run or to keep pictures away from them. In the *Robison* case, relied on by respondents (Br. 44), it was as though Warner, for example, were complaining of ouster from its present position in the illegal framework which it holds by participating in a conspiracy. All petitioners sought is what they could have obtained *in the absence of a conspiracy.*

A recent case, *Ring* v. *Spina* (CCA 2d) 148 F. 2d 647, sums up and concludes petitioners' position on this issue. The plaintiff in that case had purchased an interest in a play and then found that, in order to realize on his investment, he would have to sign the Minimum Basic Agreement of the Dramatists' Guild. He did so, and thereafter sued to enjoin its operation. The court said (p. 653):

> "* * * even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such in-

dividual as the only feasible method by which he may do business. * * * Any other conclusions would mean that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."

Respondents also argue that their price restrictions indirectly benefited petitioners because a price war was thereby prevented. However, when times were bad and it was difficult for respondents to mulct the public of their high fixed admission prices, they moved thirteen of their pre-release theatres back to later playing positions at lower admission prices (R. 516, 848). This showed that no independent theatre had any benefit whatever from the system because in depression times, or whenever it was to the advantage of B&K to do so, they could and did move their theatres back to compete at lower admission prices for the patronage of the subsequent run, while the independents could not lower their admission prices because of the forfeiture provisions of the film licenses (Rec. 193-201, 438, 489, 906, 930). As soon as business was better, B&K moved these same theatres ahead (R. 434, 435). It was only the independents which could not compete by lower admission prices. The action of respondents shows conclusively that the whole system was availed of for their exclusive benefit (R. 511-513, 516). The best brains in the industry were utilized to design a system that would have that exact sult.

Respondents quote (Br. 15) from a document which they apparently prepared and to which they obtained signatures of a number of independent theatre owners. This document was not signed by petitioners and was dated four years before they bought their theatre (R. 607). The jury were instructed by the court that petitioners were not bound by it (R. 563). Salkin testified that it did not represent his views (R. 576).

As pointed out in our original brief (p. 41), if petitioners could charge a 30¢ admission for the leavings of pictures under the restrictions of respondents' illegal system, they could certainly charge and get 30¢ for earlier pictures against the same competitors in an open market. As pointed out by this Court in the *Story Parchment* case (282 U. S. at p. 561-562) the jury did not have to assume the resulting price war which respondents seek to conjure up.

On the whole issue of damages the uncertainties which respondents allege are themselves conjectural and based upon no proof whatever. They allege at page 12 of their brief that under a system whereby petitioners were permitted to buy in an open market the resulting competition would increase the price of film rental. If this is so, one may with good reason ask why the distributors would preclude themselves from such a handsome source of profit unless to make more money by a conspiracy which prevented these subsequent run theatres from competing with the prior runs in which the distributors were sharing the box-office receipts on percentage. There is far more logic in the assumption that in an open market distributors not bound together by conspiracy but competing for business with each other would lower their film rental in order to get the business. In such a situation distributors would be competing for the business of petitioners and not conspiring to preclude them from obtaining pictures. However, we need not base our position on conjecture because we know that the Maryland theatre, divorced from the chain buying power of B&K, could not compete for earlier pictures on the basis of location, physical equipment or ability to pay film rental, and the jury, with a full view of all the facts and circumstances, has so held.

When analyzed, the whole contention advanced by respondents is that whatever deficiencies in proof exist have

been caused, created and perpetuated by their own illegal conspiracy. They say (Br. 16) "Injury to the net profits of the plaintiffs from the system found must be determined by the entire effect of that system in a comparison with the operations which would have taken place if there were no such system." Petitioners have fully established that proof and have set it forth and argued it in their original brief. Whatever uncertainty may exist in such evidence of damage is caused solely by respondents' own wrongdoing. To permit them to assert that fact as a defense to petitioners' suit is to end the treble damage sections of the Sherman and Clayton Acts in any case where wrongdoers have had complete success. No decision of this Court supports such a doctrine.

The contentions made in respondents' brief are a maze of hypothesis and conjecture unsupported by evidence. Perhaps they constituted legitimate argument at the trial, but we are way beyond that and respondents have lost that issue before the jury. The evidence in support of the verdict was pertinent and conclusive, and respondents' determined attempt to ignore and obscure the proof set forth in our original brief is in effect a confession that they have no case and no defense except their own wrongdoing.

Conclusion.

For the reasons given here and in our original brief the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and that of the District Court affirmed.

Respectfully Submitted,

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